RECENT CASES.

ANTI-TRUST STATUTE—CONSTRUCTION.—STATE v. M. K. & T. R. R. Co., 91 SOUTHWESTERN 214 (TEX.).—*Held,* that the anti-trust statutes of Texas, requiring every railroad to furinish reasonable and equal facilities for all corporations engaged in the express business, and defining a trust as a combination of capital, skill, or acts of two or more persons to create or carry out restrictions in the free pursuit of any business, should be construed as prohibiting a contract between a railroad company and an express company whereby the latter was given exclusive privileges, and the former bound itself not to contract with others to do an express contract on the road, and agreed that in case privileges should be accorded others by legislation or judicial proceedings the express company in question should have credit for the sums paid by other companies.

BANKS AND BANKING—SAVINGS BANKS—ASSIGNMENT OF DEPOSIT.—AUGSBURY v. SHURTLIFF, 99 N. Y. SUPP. 989.—*Held,* that a depositor in a savings bank may assign or transfer his interest in his deposit for a valuable consideration, without the delivery of the pass-book representing the deposit.

The relation between bank and depositor is simply that of debtor and creditor. *Marine Bank v. Fulton Bank,* 2 Wall. 252, 256, and the bank holds the fund subject to be paid out to the creditor according to the terms imposed by him. *Shipman v. Bank,* 126 N. Y. 318. Intention to assign need not be in express terms, but may be implied from any act or instrument which admits of such interpretation. *Garnsey v. Gardner,* 49 U. S. 167. The rule that a cause of action may be assigned by parol extends to a debt due to assignor from third person, as a deposit in a bank, *Phœnix Bank v. Risley,* 111 U. S. 125. A pass-book in itself constitutes no evidence of a right to draw money thereon. It merely imports a liability to depositor for moneys received. *Smith v. Brooklyn Bank,* 101 N. Y. 58. An order for whole sum due and given in good faith for a valid consideration, constitutes an assignment of deposit in hands of savings bank. *Kingman v. Perkins,* 105 Mass. 111. Although the precise point involved does not seem to have arisen, the principles involved are clear and seem to uphold the case.

CARRIERS—TREATMENT OF PASSENGERS—MENTAL SUFFERING SUBJECT FOR DAMAGES.—GULF, C. & S. F. RY. CO. v. COOPWOOD, 96 S. W. 102 (TEX.).—*Held,* that the trial judge did not err in charging that the physical and mental suffering resulting to the plaintiff from the negligent treatment of her daughter by the employees of the defendant constituted actual damages.

COMMON CARRIER—CONTRACT LIMITING LIABILITY.—TEWES v. NORTH GERMAN LLOYD STEAMSHIP COMPANY, 78 N. E. 864 (N. Y.).—*Held,* that a ticket for an ocean voyage is a contract, and that the fact that the conditions on the ticket were not brought especially to the notice of the passenger would not relieve him from the enforcement of those conditions by the company. SEE COMMENT.

CONSTITUTIONAL LAW—CONSPIRACY.—HODGES v. UNITED STATES, 203 U. S. 1.—*Held,* that the Federal courts have no jurisdiction under Thirteenth

Amendment as sections 1978, 1979, 5508, 5510, Revised Statutes, of a charge of conspiracy made and carried out in a state to prevent citizens of African descent, because of their race and color, from making or carrying out contracts and agreements to labor. SEE COMMENT.

CONSTITUTIONAL LAW—DISCRIMINATION—PUBLIC CONVEYANCES.—MORRISON V. STATE, 95 S. W. (TENN.) 494.—*Held*, that a state statute which requires the separation of white and colored persons on street cars is a proper police regulation and not violative of constitutional provisions as abridging the privileges of citizens, or depriving them of equal protection of the law.

Equal accommodations are not denied when separate, but equally good cars are furnished for white and black persons, *Britton v. Atlantic R. R.*, 88 N. C. 536; for equality of accommodations, as required by the prohibition against discrimination, is not common and joint enjoyment of such accommodations, *Anderson v. Louisville & N. R. Co.*, 62 Fed. 46. By its police power a state may not regulate interstate commerce, *Leisy v. Hardin*, 135 N. S. 100; but it has been resorted to to remove such restrictions of carriers upon interstate traffic, *Hall v. DeCuir*, 95 U. S. 485. By its police power a state may determine the reasonableness of such regulations with reference to its established customs and traditions, and for the preservation of public peace and good order. *Plessy v. Fergurson*, 163 U. S. 537. Separate cars may be required just as ladies' cars and smoking cars, as conducive to the comfort of parties separately accommodated. *Freund on Police Power*, Section 699; which latter regulation may be imposed as restricting a nuisance. *Booth on Street Railways*, Section 238. *State of Louisiana v. Heidenbain*, 42 La. An. 483.

CONSTITUTIONAL LAW—LABOR LEGISLATION—VALIDITY.—PEOPLE V. MARCUS, 77 N. E. 1073 (N. Y.). A provision of the New York Penal Code, making it a misdemeanor for an employer to coerce or compel employees to enter into an agreement not to join a labor organization as a condition to securing or retaining employment *held* unconstitutional. SEE COMMENT.

CONTRACTS—PARTIES—RIGHTS OF THIRD PARTIES.—VAN METER V. POOLE, 95 S. W. (MO.) 960.—*Held*, that a contract between two persons may be enforced by a third when entered into for his benefit.

Such a holding is an important exception to the rule,—recognized by all courts in its general application,—that a contract cannot confer rights on a person who is not a party to it. This exception is denied by the courts of England, Massachusetts, and some other states, either in law or equity, unless there is some declaration of trust. *Murray v. Flavell*, 25 Ch. Div. 89; *Exchange Bank v. Rice*, 107 Mass. 37. But is upheld in New York and most of the other states. *Lawrence v. Fox*, 20 N. Y. 268. Generally, all jurisdictions have repudiated the "blood relation" doctrine, fostered by Lord Mansfield. *Wilbur v. Wilbur*, 17 R. I. 295; *Marston v. Bigelow*, 150 Mass. 53. Even in those states where the third party beneficiary is allowed to sue, there must be something more than a mere promise for the benefit of the third person. The promise must be for his benefit, *Simson v. Brown*, 68 N. Y. 355. And, in addition, there must be between the promisee and the third person seeking to enforce the promise, the relation of debtor and creditor, or some such relation as makes the performance of the promise a satisfaction of some legal or equitable duty owing by the promisee to such third person.

Lorillard v. Clyde, 122 N. Y. 498. By statute, in many of the states,—no doubt in all of the code states,—it is expressly provided that, except in certain cases, every action must be prosecuted in the name of the real party in interest; under such a provision, it has been held that the person for whose benefit a contract is made may sue thereon. *Bliss Code Pl.* 241; *Pomeroy, Rem. & Rem. R.,* 139; *Peducah Lumber Co. v. Water Supply Co.,* 89 Ky. 340.

CONTRACTS—STATUTE OF FRAUDS—WHEN SATISFIED. ROBERTS V. TEMPLETON, 3 L. R. A. (N. S.) 790, (OREGON). Where one in possession of a mining claim under a prospecting contract with one part owner purchased the share of the other owner, and merely continued his possession and operations without anything to connect him with the later contract, *held,* that this was not a sufficient taking of possession to satisfy the statute of frauds.

CORPORATIONS—STOCKHOLDERS—PARTIES TO ACTION.—MCCREA V. MCCLENAHAN ET AL., 99 N. Y. S. 689. The defendant, McClenahan, president of the corporation, received certain corporate funds for which he failed to account and which he appropriated to purposes for his sole benefit. This action was brought under Code Civ. Proc., Section 447, providing that any person having an adverse interest, or who may be a necessary party defendant to a complete settlement of the controversy, may be joined as defendant. *Held,* that one stockholder cannot join other stockholders as parties defendants with the defaulting president, even in case they refuse to join as parties plaintiff. O'Brien, P. J., and Clarke, J., *dissenting.*

A single stockholder cannot, without suing in behalf of all interested stockholders, maintain an action for misfeasance of officers. *McAfee v. Zettler,* 103 Ga. 579. The plaintiff must bring the suit on behalf of such stockholders as care to join him, *Cook's Stock and Stockholders and Corporation Law,* Section 737; but those refusing to join him must be made defendants. *Davis v. Peabody,* 170 Mass. 397. The purpose of the code provision being to avoid a multiplicity of suits by a complete determination of rights, *Turner v. Conant,* 18 Abb. N. C. (N. Y.) 160, it has been so interpreted that any person may be made a defendant who is a party necessary to a final settlement of the question involved. *Chapman v. Forbes,* 123 N. Y. 532. *Nirdlinger v. Bernheimer,* 133 N. Y. 45, 54.

CORPORATIONS—SUITS BY STOCKHOLDERS—WHEN DEMAND FOR CORPORATE ACTION IS UNNECESSARY.—POLHEMUS V. POLHEMUS, 100 N. Y. SUPP. 263.—*Held,* that a stockholder may bring a suit in his own name for misconduct of the directors, without first requesting the corporation to bring the action, where such guilty directors are in control of the corporation.

The general rule is that stockholders cannot sue to redress injuries to the corporation caused by the misconduct of strangers or directors. *Hawes v. Oakland,* 104 U. S. 450; *Alden v. Curtis,* 26 Conn. 456; *Button v. Hoffman,* 61 Wis. 20. A stockholder may sue in equity, however, if the directors of the corporation are guilty of fraud in the management of the affairs of the corporation, and the stockholders cannot obtain redress through the corporation. *Peabody v. Flint,* 6 Allen 52. But this right of the stockholders to sue depends, as a general rule, on their inability to obtain redress through the corporation and it must appear in the bill that the stockholders attempted to obtain redress by requesting the officers of the corporation to take action. Failure to show this request and refusal, makes the bill demurrable. *Mem-*

phis & Charleston R. Co. v. Woods, 88 Ala. 630. However, where the wrong was done by the directors in control of the corporation, such a demand and refusal need not be shown in the bill nor proved. *Brewer v. Boston Theater,* 104 Mass. 378; *Rogers v. R. R. Co.,* 91 Fed. 299.

CRIMINAL LAW—ATTEMPT TO COMMIT SUICIDE—INDICTABLE OFFENSE.—MAY V. PENNELL, 64 ATL. 885 (ME.).—*Held,* that in the absence of an express statute, an attempt to commit suicide is not an indictable offense.

This case comes nearer than any decision yet reported in this country directly deciding, on common law grounds, the interesting point involved. Aside from cases construing statutes, *Commonwealth v. Dennis,* 105 Mass. 162, is the only other American case which has dealt with an attempt to commit suicide. That decision, in holding such an attempt not a punishable offense, based its reasoning on the fact that in Massachusetts the whole subject of attempt had been regulated by statute and the common law impliedly repealed. While to some extent analogous to that case, the present decision goes further and virtually holds that, in the absence of a statute, an attempt to commit suicide is not punishable. This view is in conflict with what seems to be the English rule, for, while there have been no authoritative holdings, the two cases in which the question arose clearly enunciate the doctrine that a suicidal attempt is a misdemeanor. *Reg. v. Burgess,* 9 Cox C. C. 247; *Reg. v. Doody,* 6 Cox C. C. 463. So, also, the leading text writers have approved and adopted this view. *Clark's Criminal Law,* 196. *A priori,* it would seem, that, if suicide can be considered a crime, an attempt to commit that crime is punishable. At common law suicide was a crime. 4 Blackstone 190. And, although *Blackburn v. State,* 23 Ohio State 146, is authority to the contrary, recent decisions reiterate this view. *Commonwealth v. Hicks,* 118 Ky. 637; *State v. Levelle,* 34 S. C. 120.

CRIMINAL LAW—MANSLAUGHTER—NEGLIGENCE.—STATE V. MOORE, 106 NORTHWESTERN 16 (IA.).—*Held,* that a conviction for manslaughter should be sustained on facts showing a reckless and negligent indifference to the safety of others, and it is also held that it was unnecessary for the state in order to support a conviction to prove that the deceased person was not guilty of contributory negligence.

CRIMINAL LAW—RIGHT OF MURDERER TO INHERIT FROM VICTIM.—MCALLISTER V. FAIR, 84 PACIFIC 112 (KANSAS).—*Held,* that under a statute of Kansas, providing in clear terms that a husband shall inherit from his deceased wife, and making no exception to the rule, the court is not justified in reading into the statute a clause disinheriting a husband because he feloniously killed his intestate wife for the purpose of acquiring her property.

DIVORCE—CONVICTION OF CRIME—EFFECT OF PARDON.—HALLOWAY V. HALLOWAY, 55 S. E. 191 (KY.).—A statute provides that the conviction of a married person of an offense involving moral turpitude, followed by a sentence in the penitentiary for a term of two years or longer, gives to the other party to the marriage a right to a divorce. The defendant was convicted of such an offense, and, after serving five years in the penitentiary, was pardoned. After the pardon the other party to the marriage brought her bill for divorce. *Held,* that her right to a divorce was not affected by the pardon.

This case is a direct ruling on a hitherto undecided point. The weight of authority upholds the general rule that an absolute pardon relieves the

person to whom it is granted from all consequential disabilities of judgment and restores him to his prior rights. *Wood v. Fitzgerald,* 3 Or. 568; *State v. Foley,* 15 Nev. 64. The only exception to this is that a full pardon cannot restore to the recipient any rights or interests which have become vested in others in consequence of the judgment. *Ex parte Garland,* 71 U. S. 333. From this some text writers have reasoned to the conclusion set forth by this case. *Schouler's Husband and Wife,* 554.

EASEMENTS—PARTY WALLS.—JACKSON V. BRUNS, 106 NORTHWESTERN 1.—*Held,* that the owner of the second story of a building has no equitable right to compel the owner of the first story to keep the foundation and walls of the first story in repair for the purpose of furnishing continuing support to the second story in the absence of any express or implied contract on the part of the owner of the first story to do so.

EVIDENCE—OPINION EVIDENCE—QUALIFICATION OF WITNESS.—MANHATTAN DELIVERY CO. V. SIMON, 98 N. Y. SUPP. 844.—*Held,* it was error to permit a witness to testify as to the value of certain work done on garments, without having previously qualified himself as competent to so testify.

Although opinions of witnesses are to be excluded except upon questions of science and skill, as to which they have been specially educated, yet a witness may give estimates and opinions on questions of value. *Willis v. McCarn,* 33 Barber, 115. The general rule is to the contrary, however, and a witness must first qualify before he can testify as to opinion of value of certain articles. *Gregory v. Fichter,* 14 N. Y. Supp. 891. Where an article has no market value, its value may be shown by opinions of witnesses properly informed as to things of a similar nature. *Sullivan v. Lear,* 23 Fla. 463. Opinions respecting value of property are incompetent when witnesses fail to show a sufficient general knowledge of the subject-matter, *Haight v. Kimbark,* 51 Ia. 13. But the objection cannot be urged where an opportunity for cross-examination has been given. *Klotz v. James,* 96 Ia. 1.

EVIDENCE—REGULATIONS OF DEPARTMENTS OF GOVERNMENT—JUDICIAL NOTICE.—STATE V. SOUTHERN RY. CO., 54 S. E. 295 (N. C.).—*Held,* the courts will take judicial notice of the rules and regulations adopted by the United States Department of Agriculture, concerning cattle transportation, and applicable within the state.

Courts should take judicial notice of what ought to be generally known within the limits of their jurisdiction. *Gordon v. Tweedy,* 74 Ala. 238. In the early cases there was a tendency to refuse to take judicial notice of the regulations of the executive departments. So in 1857, the courts of California refused to take judicial notice of the rules of department of the Interior. *Hensley v. Tarkey,* 7 Cal. 288. Similarly in regard to regulations of Treasury Department. *Moore v. Worthington,* 63 Ky. 307. Now it is generally recognized that the rules and regulations of one of the departments of government, established in accordance with statute, have the force of law, *Gratiot v. U. S.,* 4 How. 80; and courts take judicial notice of them. *Long v. Hanson,* 72 Me. 104. Hence, the courts of Montana will take judicial notice of the rules and regulations of the Department of the Interior. *U. S. v. Williams,* 6 Mont. 379. Federal courts take judicial notice of administrative regulations of considerable notoriety, including the rules of Federal executive departments. *Dominici v. U. S.,* 72 Fed. 46.

INSURANCE—LIFE INSURANCE—WARRANTIES.—NATIONAL LIFE INS. CO. OF U. S. A. v. REPPOND, 96 S. W. 778 (TEX.).—*Held*, that, where the statements in the application for a life policy are made warranties, it is essential to the validity of the policy that the statements be true without reference to the question of their materiality.

Warranties are in the nature of conditions precedent, so that the rights of the insured depend on his strict compliance with the warranties. *Fowler v. Ins. Co.*, 6 Cow. (N. Y.) 673; *Metropolitan Life Ins. Co. v. Rutherford*, 98 Va. 195. In the present case, the statements in the application were made warranties. Stipulations of this character are necessary to protect the insurer. *Vance on Insurance*, Section 104. Courts will presume conclusively that statements are material when they are made warranties by the parties, as in this case, and a breach of a warranty will be a good defense in an action on the policy. *Hutchinson v. Ins. Co.* 39 S. W. (Texas) 325; *Stensgaard v. St. Paul Real Estate Title Ins. Co.*, 50 Minn. 429; *Jeffries v. Ins. Co.*, 22 Wall. (U. S.) 47.

MANDAMUS—RIGHT TO APPEAL.—HANSON V. POLICE JURY OF ST. MARY'S PARISH, 41 So. (LA.) 321.—*Held*, that mandamus generally will not lie if there is a right of appeal.

The functions of this prerogative writ are the enforcement of duties to the public by officers, and others who neglect or refuse to perform them and for which there is no other specific legal remedy, *Legg v. City of Annapolis*, 42 Md. 203, and mandamus cannot be used to perform the office of an appeal or a writ of error, *Ex parte Schwab*, 98 U. S. 240. This general rule is too far-sweeping and invites the criticism of a rigidity approaching harshness, for this writ will be granted when the remedy by action is doubtful. *Clark v. Miller*, 47 Barber, 38; or even if there is an equitable remedy existing. *Commonwealth v. Allegheny County Com'rs*, 32 Pa. 218. The same exception is taken when a writ of error is inadequate by reason of expense and delay involved, *North Alabama Development Co. v. Orman*, 71 Fed. 764; or when there is a remedy by appeal, if the action is clearly inadequate, *City of Huron v. Campbell*, 3 S. D. 309; or when an appeal is proper, but there is no one to prosecute it, as, after a claim has been filed by an administrator against the estate of another decedent, if such administrator die and a motion to revive the action in the name of his successor is denied, the only remedy is by mandamus, *Reynolds v. Crook*, 95 Ala. 570.

MASTER AND SERVANT—SAFE PLACE TO WORK.—WALKER V. GLEASON, 96 N. Y. SUPP. 843 (N. Y.).—Landlord contracted with a tenant to keep the hall lamps in the building in order, and subsequently, while the tenant was working with the lamps in one of her own rooms, the ceiling fell and injured her. Thereupon the landlord was sued for the personal injuries, the tenant contending that the relation of master and servant existed.—*Held*, that under these circumstances the landlord was not liable on the ground that, as an employer, he had failed to furnish a safe place to work.

NUISANCE—RIGHT TO RECOVER DAMAGES.—MILLER V. EDISON ELECTRIC ILLUM. CO., 3 L. R. A. (N. S.) 1060 (N. Y.).—*Held*, that a lessor cannot recover damages for injury to the enjoyment and occupation of premises while they are in possession of a tenant, by the maintenance of a nuisance not of a permanent character on adjoining premises, although during such

continuance the lease had terminated and been renewed at a reduced rental because of the nuisance.

PARTNERSHIP—TRADE-MARKS AND TRADE NAMES—RIGHTS OF RETIRING PARTNER.—WHITE V. TROWBRIDGE, 64 ATL. 862 (PA.).—A retiring partner disposed of all his rights and property in the firm, but entered into no contract restricting him from prosecuting a similar competing business. *Held,* that he is not deprived of the right to use his own name in connection with such competing business, from the fact that his surname is a portion of the trade-mark used by the firm of which he was formerly a member.

A person has the right to the honest use of his own name, even to the infringement of a trade-mark. *Derringer v. Plate,* 29 Cal. 293; *Schier v. Johnson,* 111 Mass. 238. However, an assignment by a retiring partner of all his stock, property and effects carries the right to use his personal name when it has become a trade name. *Hoxie v. Chaney,* 143 Mass. 592. And it follows that the firm is entitled to protection in the use of such name. *Myers v. Buggy Co.,* 54 Mich. 215. In some cases this doctrine has been extended and *Le Page v. Russia Cement Co.,* 51 Fed. 941, holds that, when an individual's name has become a trade name belonging to another person, the right to use his name in connection with an article, even to state that it is manufactured by him, must be denied to a person who has previously disposed of his interest in the business. The better rule, however, would seem to be that, when a person has in any way acquired a right to a trade name, another person is only precluded from using his own name in such a way as to confuse his business with that of the original firm. *Walter Baker & Co. v. Baker,* 87 Fed. 209; *Gage v. Pub. Co.,* 10 Ont. App. 402.

RAILROADS—NEGLIGENT OPERATION—NUISANCE.—COLGATE V. N. Y. CENT. RY. CO., 100 N. Y. SUPP. 650.—*Held,* where a railroad company so negligently operated its road as to permit unnecessary whistling and bell ringing in the residential section of a town, such acts constituted a private nuisance to an abutting land owner.

An action will not lie for mere consequential injuries caused by the proper and careful operation of a railroad. *Beseman v. Penn. Ry. Co.,* 50 N. J. Law 235; *Struthers v. Dunkirk W. & P. Ry. Co.,* 87 Pa. 282. But whistling and bell ringing as allowed by the legislature, are not signals for the convenience of its employees, and if used as such and thereby the public is unnecessarily disturbed, they constitute a legal nuisance. *Presbrey v. Railway Co.,* 103 Mass. 1; *Williams v. N. Y. Cent. Ry. Co.,* 16 N. Y. 97. What may be unobjectionable in a legal sense, in one locality may be a legal nuisance in another. *First Baptist Church v. Utica & S. R. Co.,* 6 Barb. 373; *Rodenbransen v. Craven,* 141 Pa. 546. The weight of authority in the United States is that, to constitute a nuisance, the acts must be such as to materially interfere with the comfort of an ordinary, reasonable person in the vicinity, *Sparhawk v. Railway Co.,* 54 Pa. 401; *Westcott v. Middleton,* 43 N. J. Eq. 478; and not merely to incommode a sick person. *Rogers v. Elliott,* 146 Mass. 349; *Fay v. Whitman,* 100 Mass. 76. And it is no defense that all the other persons in that locality are injured in the same way. *Wesson v. Washburn Iron Co.,* 13 Allen, 95.

RELIGIOUS SOCIETIES—TITLE TO PROPERTY—MATERIALITY.—LEE V. METHODIST EPISCOPAL CHURCH IN V. S., 78 N. E. 646 (MASS.).—A grantor con-

veyed land to grantees by a deed in consideration of money paid by them as trustees of an unincorporated church the words being "trustees, their heirs and assigns." *Held,* in a suit by new trustees against persons acting as new trustees, involving the right to the property that the intention of the grantor to vest the property in the grantees as trustees was immaterial; for, if the deed was to the grantees as trustees, the title to the property did not vest in others by force of their appointment as trustees.

The general rule is that a trustee cannot delegate his authority. *Bispham on Eq.,* p. 219. The election of new trustees by an incorporated society in conformity with the usages of their church, created no privity of estate between them and the trustees who took the land by the deed, and could have no effect in law to divest of the title, those grantees named in the deed or the survivor of them. *Peabody v. Eastern Methodist Society in Lynn,* 87 Mass. 540. But a conveyance to trustees for the use of a religious society without naming any of them vests the title in the corporation named in the deed. *Keith & P. Coal Co. v. Bingham,* 97 Mo. 196. It is even held that a conveyance to trustees for the use of a religious society, whether trustees are or are not named, executes a legal estate in the congregation itself not by way of charitable use, but in absolute ownership. *Brendle v. German Ref. Cong. of Jackson Township,* 33 Pa. 415.

RESULTING TRUST—PAYMENT OF PURCHASE MONEY—STATUTES.—FAGAN V. MCDONNELL, 100 N. Y. SUPP. 641. Where a purchaser paid the consideration for a conveyance and took title in the name of his niece, without her knowledge, and she subsequently, having learned of it, executed a deed, blank as to grantees, and gave it to the purchaser. *Held,* that although he and his devisees held the property for eighteen years and the niece never claimed the rents nor looked after it in any way, an action in ejectment would lie. Jenks, J., *dissenting.*

In the absence of statute it is a general rule in England and in the United States that where a purchaser pays the purchase money, but takes the title in the name of another, a trust will result, by presumption of law, in his favor. *Perry on Trusts,* Section 126; *Dyer v. Dyer,* 2 Cox. 92. A few states, however, including New York, declare by statute that no such trust will result unless the grantee takes as an absolute conveyance in his own name, and without the consent of the purchaser. *Real Prop. Laws of N. Y.* (1896) Section 74. Such statutes are analogous to the common law rule, that where there is a feoffment to another without a consideration, if the use was actually declared it would prevail. *1 Sander's Uses and Trusts,* 59; *Sugden's Gilbert Uses,* 89. These statutes, however, make an exception when there is a fraud, and a trust may be insisted upon. *Kennedy v. McCloskey,* 170 Pa. 354. *Rouchefoucaula v. Boustead,* 1 Ch. 206. Hence, in this case, a defrauded creditor would be allowed to enforce a resulting trust, so far as may be necessary for the satisfaction of his claim. *McCartney v. Bostwick,* 32 N. Y. 53; *1 Stimson's Am. St. Law,* Section 1706. Or if the grantor did not consent to it, *Haack v. Weicker,* 118 N. Y. 67; *Lloyd v. Woods,* 176 Pa. 63. However, a resulting trust will not arise against the positive provision of a statute, nor in contravention of public policy. *Bispham on Equity,* (7th ed.) Section 82; *Hill on Trustees,* p. 93, 94. And parol evidence is admissible both to create and rebut such resulting trusts. *Swinburne v. Swinburne,* 28 N. Y. 568; *Blodgett v. Hildreth,* 103 Mass. 487.

TAXATION—TRANSFER TAX—CORPORATE STOCK.—IN RE COOLEY'S ESTATE, 78 N. E. (N. Y.) 939. A Massachusetts and a New York corporation combined and incorporated under the laws of both states with a single issue of stock, one-sixth of the property being in New York. *Held,* that the tax imposed by the New York statute upon the transfer by will of such stock as personal property of a non-resident decedent is to be assessed upon the basis of the location of the property. Werner & Chase, JJ., *dissenting.*

The transfer tax is not a property tax, *In re Wolfe's Estate,* Section 9 App. Div. (N. Y.) 349; it is an excise or duty on the privilege of succession, *Cooley on Constitutional Limitations,* page 708; *State of Missouri ex rel. Garth v. Switzler,* 40 L. R. 9 (Mo.) 280. As such privilege, it is the creation of the civil or municipal law, *Strode v. Com.,* 52 Pa. 181; and, as applied in the main case, is denied at common law, *Union Bank v. State,* 9 Yerg. (Tenn.) 490. The incorporating state may then give shares of stock a special *situs* for taxation purposes. *Cooley on Taxation* (2nd ed.), p. 23; *Tappan v. Merchant's Nat. Bank,* 19 Wall. (U. S.) 490; though by the general rule personalty follows the domicile of the owner. *Thompson v. Advocate Gen.* 12 Clark & F. 1; *Story on Conflict of Laws,* Section 481, *et seq.; In re Romaine's Estate,* 127 N. Y. 80. As in the main case, the amount of the tax may be fixed by referring to the value of the property passing, *Plummer v. Coler,* 178 U. S. 115; but a tax upon the entire amount could not be objected to on constitutional grounds, *Blackstone v. Miller,* 188 U. S. 189. That such a tax should be reasonable is enforced on the grounds of natural justice and the spirit of the Constitution. *Tyson v. State,* 28 Md. 577; *Minot v. Winthrop,* 162 Mass. 113. This seems to be the real reason for the equitable doctrine of the main case in avoiding double taxation. SEE COMMENT, *supra.*

TELEGRAPH COMPANIES—DELAY IN TRANSMITTING MESSAGES—DAMAGES. LUCAS V. WESTERN UNION TELEGRAPH COMPANY, 109 N. W. 191 (IA.).—*Held,* that if because of unreasonable delay in the acceptance, a contract was not completed, then it was for the jury to say whether the defendant was negligent in transmitting the message, and owing to this the plaintiff lost the benefit of entering into the contract. SEE COMMENT.

TORTS—ELECTRICITY—DUTY OF ELECTRIC LIGHT COMPANY, 100 N. Y. SUPP. 539.—*Held,* that an electric light company owed to a licensee or trespasser on its poles no duty to keep its wires properly insulated and one standing in either relation to it must be held to the exercise of reasonable care.

Care in the case of persons using a highly destructive agency means more than mere mechanical skill; it includes circumspection and foresight with regard to reasonably probable contingencies. *Anderson v. Jersey City Electric Light Co.,* 43 Atl. 654 (N. J.). However, those who employ in the prosecution of their business a highly dangerous agency such as electricity are bound to exercise such precaution to prevent injury to others as emergency would reasonably seem to require. *Atlanta Consol. Street R. Co. v. Owings,* 97 Ga. 663; *Joyce on Electric Law,* par. 664. *In Newark Electric Light & Power Co. v. Gorden,* 39 U. S. App. 416, a distinction is made between a trespasser and a licensee, holding that an electric light company is not bound to keep the insulation of his wires upon a pole in good condition as against a mere trespasser who intrudes upon such pole, but in maintaining wires upon same pole with other companies is bound to use due care in insu-

lating such wires. One doctrine goes so far as to hold that the only way to prevent accident where deadly electricity is used is to have perfect protection at those points where people are liable to come into contact with it, on the ground that as electricity cannot be seen and is silent and deadly, those who manufacture and use it for private advantage must do so at their own peril. *Overall v. Louisville Electric Light Co.*, 47 S. W. 442 (Ky.).

TORTS—RAILROADS—INJURIES TO LICENSEE—HAYMAN V. PHILADELPHIA & R. RY. CO., 63 ATL. 967 (PA.).—Plaintiff, an employee of a locomotive works, was engaged in loading an engine on defendant's cars. While walking on the track back to the works, he was struck by the engine. *Held*, that this is within act of 1868 (P. L. 58), Section 1, providing that when any person shall sustain personal injury or loss of life while lawfully engaged or employed about the premises of a railroad company, of which he is not an employee, the right of action shall be the same as if such person were an employee, but this section shall not apply to passengers. The place of plaintiff's injury was in the premises of the defendant and plaintiff must be considered a quasi employee at the time of the accident. Mestrezat, Potter and Elkin, JJ., *dissenting*.

Whether or not the object of the person injured was one in which the owner of the premises was interested, is of decisive importance in determining whether the party was a licensee merely or was invited. *Larmore v. Crown Point Iron Co.*, 101 N. Y. 391. When persons engage in a business directly connected with a railroad, they are discharging the duties of employees and are to be regarded as such. *Richter v. Penn. Co.*, 104 Pa. 513. But a servant who leaves work assigned him in a place of safety and voluntarily places himself in a dangerous position, where he is hurt, has no right of action against his employer. *Knox v. Pioneer Coal Co.*, 90 Tenn. 546. A servant may be in the service of two masters, who, as regards his service and employment, will be regarded as partners. *Swainson v. Northeastern R. Co.*, 3 Exch. Div. 341. There are *dicta* implying the contrary to the effect that persons upon railroad tracks, even by express invitation, may reasonably be expected to avoid danger from trains. *Schreiner v. Great Northern Railway Co.*, 58 L. R. R. 77 (Minn.).

TRADE-MARKS—TRADE NAMES—RIGHT TO INJUNCTION.—WARREN BROTHERS V. BARBER ASPHALT PAVING CO., 108 NORTHWESTERN 652 (MICH.).—*Held*, that where a city calls for proposals for the construction of "Bitulithic" pavement, and requires the pavement to be made according to certain specifications, a company might be awarded the contract for the work, although another company has habitually used the word "bitulithic" as a name for the particular pavement made by them, and had had this trade name registered and also filed for record as a trade name in the office of the secretary of the state of Michigan. The court says that the injunction must be denied because a trade name does not give one the exclusive right to make or sell a given kind of goods, the trade name being simply to point out the origin or ownership of the article to which it is affixed for the protection of the consumer, and that in cases where the rights to the use of a trade name are invaded the wrong consists in the sale of goods of one maunfacturer under the false representation that they are the goods of another.